

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7500  
(202) 693-7365 (FAX)



**Issue Date: 03 December 2002**

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In the Matter of

LAURA M. JESSEE, widow of  
FREDERICK A. JESSEE  
Claimant

Case No.: 2002 BLA 5005

v.

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
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Appearances:

Mrs. Laura Mae Jessee  
*Pro Se*

Mr. Toye Olarinde, Attorney  
For the Employer

Before:

Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER - DENIAL OF BENEFITS**

This matter involves a survivor claim filed by Mrs. Laura M. Jessee, widow of Mr. Frederick A. Jessee, for benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("Act"). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

**ISSUES**

1. Whether the health issues associated with Mr. Jessee's pulmonary condition and death should be considered.
2. Length of coal mine employment.
3. Whether Mr. Jessee suffered from pneumoconiosis.

## Claim Histories and Procedural Background

### Mr. Frederick Jessee's Claims

#### *First Claim*

Shortly after losing his job as a coal miner due to a hand injury, Mr. Jessee filed his first claim for benefits on March 24, 1971 with Social Security Administration (DX 10-1).<sup>1</sup> Eventually, complaining about shortness of breath, he re-filed with the U.S. Department of Labor ("DOL") on February 20, 1975 (DX 10-2). However, the claim was denied on August 8, 1980 (DX 10-3).<sup>2</sup>

#### *Second Claim*

In February 1989, Mr. Jessee filed second claim for benefits with DOL. The pulmonary examination the next month revealed Mr. Jessee was totally disabled by a severe pulmonary obstruction and hypoxemia (DX 11-6). Initially, the physician attributed his pulmonary impairment, diagnosed as chronic bronchitis and emphysema, to both coal dust exposure and cigarette smoke. Mr. Jessee had claimed 19 years of coal mine employment (DX 11-9). However, DOL could only verify less than one year of coal mining. When the physician was presented with DOL's estimate of Mr. Jessee's coal mine employment, the doctor concluded his totally disabling impairment was not related to coal dust. Since the chest x-ray was negative (DX 11-8), and based on the physician's revised diagnosis, DOL denied his claim on August 11, 1989 for failure to establish the presence of pneumoconiosis (DX 11-10).

#### *Third Claim*

On April 25, 1992, Mr. Jessee filed his third claim with DOL (DX 12-1). Again, the pulmonary examination disclosed a very severe pulmonary impairment in the form of emphysema (DX 12-8). With some confusion, Mr. Jessee claimed 20 years of coal mine employment. However, the physician believed he had only two years of such work. Since the chest x-ray was negative, the doctor concluded his pulmonary condition was due to cigarettes. As a result, DOL again denied Mr. Jessee's claim on August 18, 1992, for failure to prove the presence of pneumoconiosis, total disability due to pneumoconiosis, and a material change in conditions (DX 12-13).

#### *Fourth Claim*

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<sup>1</sup>The following notations appear in this decision to identify exhibits: DX - Director exhibit and ALJ - Administrative Law Judge exhibit.

<sup>2</sup>Many of the documents associated with Mr. Jessee's first two claims are no longer in the record (DX 10-4 and DX 11-1)

On December 7, 1993, Mr. Jessee filed his fourth claim for benefits (DX 13-1) supported by a physician's statement that he had severe end-stage lung disease (DX 13-10). DOL requested additional medical information but when such documentation wasn't presented, DOL denied the claim on June 2, 1994 for failure to prove pneumoconiosis (DX 13-12). In response, Mr. Jessee's physician forwarded Mr. Jessee's medical records from 1990 to 1994 showing treatment for COPD (chronic obstructive pulmonary disease), bronchitis and emphysema (DX 13-13). Unfortunately, Mr. Jessee passed away a few weeks later on August 19, 1994. The death certificate listed the cause of death as coal workers' pneumoconiosis (DX 13-16). Upon review of the record on May 15, 1995, DOL determined that Mr. Jessee had three and a half years of coal mine employment (DX 13-18). However, the chest x-rays and medical evidence remained insufficient to establish the presence of pneumoconiosis. Consequently, DOL denied the claim for failure to prove pneumoconiosis, total disability due to pneumoconiosis and a material change in conditions.

### Mrs. Laura Jessee's Claims

#### *First Claim*

On August 21, 1995, Mrs. Jessee filed a survivor claim under the Act, expressing her belief that her husband's black lung disease was due to his coal mine employment (DX 14-1). Additional medical records were provided and Mr. Jessee's treating physician, Dr. Stephen Irvin, expressed his opinion that Mr. Jessee had pneumoconiosis due to his long history of coal mine employment covering 20 years (DX 14-13 and DX 14-14). Dr. Irvin also recognized Mr. Jessee's smoking history but believed pneumoconiosis was partially responsible for his pulmonary condition. However, another physician, board certified in pulmonology, reviewed the medical record and concluded based on Mr. Jessee's coal mining history of just under four years that Mr. Jessee did not have pneumoconiosis (DX 14-15). Instead, his 45 pack year history of cigarette use was the cause of his severe COPD. As a result, the doctor opined Mr. Jessee's death was not due to pneumoconiosis.

Based on the later medical evaluation, DOL denied the claim on February 16, 1996 and indicated Mrs. Jessee had sixty days to file additional evidence (DX 14-16). On April 12, 1996, DOL received Mrs. Jessee's written response indicating her dissatisfaction with the decision and stating she wanted to have her "claim for widow's Black Lung appealed back" (DX 14-19). DOL reviewed additional medical record documenting Mr. Jessee's last days in the hospital in August 1994 (DX 14-22). In the hospitalization record, the attending physician diagnosed end-stage pneumoconiosis and severe lung disease. Further, more chest x-ray interpretations were negative for pneumoconiosis (DX 14-17 and DX 14-18). After an informal conference on June 27, 1996, DOL once again denied Mrs. Jessee's survivor claim on the basis that her husband did not have pneumoconiosis and his death was not due to black lung disease (DX 14-23). After considering Mr. Jessee's claimed range of coal mine employment from 6 to 19 years, DOL also determined the reliable employment records only disclosed less than one year of coal mine employment. The DOL July 11, 1996 notice of the denial further informed Mrs. Jessee that if she was dissatisfied with the decision, she could request a formal hearing with the Office of Administrative Law Judges ("OALJ") by submitting a written appeal within 30

days. Otherwise, the decision would become final. Apparently, Mrs. Jessee took no further action on this claim.

### *Second Claim*

On August 2, 1997, Mrs. Jessee filed another survivor's benefit claim for herself and on behalf of her disabled child (DX 15-1). DOL denied the claim less than two weeks later, on August 13, 1997 because Mrs. Jessee had failed to prove her husband, Fred, had pneumoconiosis and that his death was due to pneumoconiosis (DX 15-3).

### *Third and Present, Claim*

On March 29, 2001, Mrs. Jessee filed her third survivor claim (DX 1). On November 20, 2001, DOL denied her claim because her claim was considered a "subsequent" claim under the new regulations and she had failed to provide any information that would change a condition of entitlement (DX 7). Mrs. Jessee appealed the decision and requested a hearing with OALJ (DX 9). As a result, DOL forwarded her claim to OALJ on January 9, 2002 for a hearing (DX 16). Pursuant to a Notice of Hearing, dated March 25, 2002, I set a hearing date of June 27, 2002 in Abingdon, Virginia (ALJ I). However, prior to the hearing, Ms. Jessee indicated that her health precluded her attendance at the proceeding and she requested a decision on the record. On July, 2002, I informed the parties that I would keep the record open through July 31, 2002 for the submission of any additional evidence by the parties (ALJ II). Since none of the parties have submitted any additional evidence, my decision in this case will be based on all documents previously admitted into evidence (DX 1 to DX 17).<sup>3</sup>

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Issue No. 1 - Consideration of Mr. Jessee's Health Issues**

Under the new regulations, as amended January 19, 2001, Title 20, Code of Federal Regulations, Section 725.309(d)(3) states, a "subsequent claim filed by a surviving spouse . . . shall be denied unless the applicable conditions of entitlement in such claim include at least one condition **unrelated to the miner's physical condition at the time of death**" (emphasis added). As the U.S. Department of Labor indicated in its November 20, 2001 denial of Mrs. Jessee's third claim (DX 7), that type of applicable "condition" generally relates to the status of the claimant as an eligible survivor (married state and dependency) or whether the deceased miner:

- a. Was receiving benefits under the Black Lung Benefits Act due to a claim filed before January 1, 1982; or,

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<sup>3</sup>In October 2001, Mr. Ron Carson, on Mrs. Jessee's behalf, sent DOL a copy of Mr. Jessee's death certificate and the August 1994 hospitalization notes by Dr. Irvin concerning his death. These documents are already in the record as DX 3, DX 4, DX 14-9 and DX 14-22.

b. As a result of a claim filed prior to January 1, 1982 is determined to have been totally disabled at the time of his death.

Mrs. Jessee filed her present survivor claim in March 2001, more than a year after the denial of her previous claims in June 1996 and August 1997. In the present claim, Mrs. Jessee again firmly asserts her belief that her husband both had pneumoconiosis and died due to pneumoconiosis. As set out in the procedural history above, the issue concerning Mr. Jessee's health at the time of his death has already been adjudicated and denied against Mrs. Jessee's position in June 1996 and August 1997. Consequently, if Mrs. Jessee's present, subsequent survivor claim were a typical subsequent survivor claim, the regulations would prohibit reconsideration of whether Mr. Jessee had pneumoconiosis or died due to black lung disease even though Mrs. Jessee understandably continues to disagree with those prior adverse decisions. As a result, since Mrs. Jessee provided no other information that would affect any of the other applicable conditions of entitlement as set out above, I would ordinarily deny her present subsequent survivor claim without consideration whether Mr. Jessee had black lung disease and died due to pneumoconiosis.

However, based on the procedural history of Mrs. Jessee's first survivor claim, I find an unusual circumstance exists in Mrs. Jessee's case that indeed warrants my consideration her husband's pulmonary condition. Notably, following the initial denial of her first survivor's claim, Mrs. Jessee appealed the adverse determination in writing.<sup>4</sup> Yet, rather than forward the case to OALJ for a hearing, DOL conducted another conference, albeit a "formal" one. I believe DOL's subsequent administrative action was insufficient to negate the effect of her appeal. Although DOL was certainly free to reconsider its initial denial decision through the formal conference process, when DOL reaffirmed its denial and did not provided the relief claimed by Mrs. Jessee, the agency should have sent the case to OALJ without requiring Mrs. Jessee, who did not have an attorney representing her interests, to submit another written appeal.<sup>5</sup> Correspondingly, since the DOL formal conference was a procedurally insufficient response to Mrs. Jessee's appeal, it did not serve as a final decision on her first claim. The procedural consequence is that her first claim has never been closed which thus now permits my consideration of all aspects of her claim for survivor benefits.

## **Issue No. 2 - Length of Coal Mine Employment**

As indicated above in the procedural review, one of the central issues has been Mr. Jessee's length of coal mine employment. Through the course of their claims, while Mr. and Mrs. Jessee have

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<sup>4</sup>Almost any communication which expresses an intention to appeal an adverse decision is considered a request for a hearing. Once such a request is filed, a second request is not necessary. *See Plesh v. Director, OWCP*, 71 F.3d 103 (3d Cir. 1995).

<sup>5</sup>Although the new regulations were not in effect at the time of her first survivor's claim, I note that the newly amended regulations indicate even a previously filed, or premature, hearing request will be considered valid and require forwarding the case to OALJ. *See* 20 C.F.R. § 725.418 (c).

presented varying degrees of specificity concerning his length of coal mine employment, they persistently claim he worked as a coal miner for 19 to 20 years. DOL has also reached varying conclusions on this issue from a high of 3.55 years (DX 14-15) to the present low of 0.776 years (DX 14-23). The later figure was determined based solely on the earnings record from the Social Security Administration (“SSA”) because the submissions from the Jessees were unreliable due to their variability.

The new regulations, 20 C.F.R. § 725.101 (a) (32) (ii), indicates, in determining years of coal mine employment, to the extent possible, the beginning and ending dates of coal mine employment may be established by any credible evidence. I understand DOL’s frustration with the varying accuracies of the work histories submitted by Mr. and Mrs. Jessee. Yet, upon consideration of the entire record, I believe the Jessees have provided sufficient detail, in the form of employers’ names, location of the mines, Mr. Jessee’s work, and usually the start and stop dates of employment in terms of month and year to consider their submissions reliable.<sup>6</sup> A portion of the variability in Mr. Jessee’s recollections may be attributed to some of his health issues.<sup>7</sup>

Part of this dispute also relates to the parties’ meaning of “length.” DOL is attempting to ascertain through various means the actual time Mr. Jessee spent in coal mines exposed to coal dust. At the same time, since Mr. Jessee first entered the coal mines in 1952 and last worked as a coal miner in 1971, the representation by both Mr. Jessee and Mrs. Jessee that he worked 20 years as a coal miner is understandable. However, as noted below even based on the Jessees’ employment histories, during that 20 year period, Mr. Jessee’s work as a coal miner was sporadic and not continuous. In fact, Mr. Jessee didn’t mine coal in 1954 and between approximately 1960 through 1966, a total of eight years. Additionally, even when he was employed as a coal miner, Mr. Jessee typically worked less than the full twelve months of the year. As a result, Mr. Jessee did not experience the same extent of coal dust exposure as a coal miner who worked 12 months a year for 20 years.

I have prepared the following coal mine employment history for Mr. Jessee by piecing together the various employment information, including the claimants’ recollections and the earnings record from SSA.

1952

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<sup>6</sup>In her second survivor claim, Mrs. Jessee even went to the effort to provide additional information about several former employers and co-workers, including, in some cases, their phone numbers (DX 14-21).

<sup>7</sup>In February 1988, a Social Security Administrative Law Judge approved Mr. Jessee’s application for SSI on the basis of a disability (DX 11-9). According to the decision, Mr. Jessee had about 19 years of coal mine employment, which ended in 1971. Mr. Jessee had not worked since then. The judge also observed that Mr. Jessee had a third grade education (on two claim applications in the record, Mr. Jessee indicated third grade was the highest grade he completed (DX 10-2 and DX 12-1)) and thus marginal education and a mild mental deficit.

Mr. Jessee started his work as a coal miner in August 1952 in Saint Charles, Virginia, loading coal and setting timbers for Mr. Adern Belcher and Mr. John Maness, and worked through November 1952 (DX 2, DX 10-1, DX 12-2, DX 13-3, DX 14-2, and DX 14-21).<sup>8</sup> Mr. Daily Tritt verified the employers (DX 13-5) and the SSA summary shows income earned the last two quarters of the year from Mr. John Maness, as H. S. Coal Co. (DX 13-6 and DX 14-5). Credit: 4 months

#### 1953

In this year, Mr. Jessee loaded coal for Lester Redwine and Monk Geiser in Saint Charles, Virginia from January to July (DX 2, DX 13-3, DX 14-2, and DX 14-21).<sup>9</sup> Credit: 7 months - Cumulative Total: 11 months

#### 1955

From January to July, Mr. Jessee loaded coal at Puckett's Creek for Mr. Ed Brewer. In the second half of the year, July to November, he worked for his father, Mr. Clifford Jessee (*see* DX 3) and Mr. Trap Hart in Saint Charles, Virginia, setting timbers and loading coal. In November and December, Mr. Jessee finished the year loading coal for Mr. Lloyd Martin at Cranch Creek, Kentucky (DX 2, DX 13-3, DX 14-2, and DX 14-21). Credit: 12 months - Cumulative Total: 23 months

#### 1956

For one month, January, Mr. Jessee continued his coal mine employment with Mr. Lloyd Martin at Cranch Creek, Kentucky (DX 2, DX 13-3, DX 14-2, and DX 14-21). From August to December, Mr. Jessee loaded coal for Mr. Ed Morgan at Puckett's Creek (DX 13-3, DX 14-2, and DX 14-21).<sup>10</sup> Credit: 6 months - Cumulative Total: 29 months

#### 1957

In 1957, Mr. Jessee had three employers. First, from January to April, he continued his employment with Mr. Morgan. Then, he worked for Mr. Adern Belcher and Jim Riden at Saint

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<sup>8</sup>On one DOL work history form, Mr. Jessee listed the years of employment for Maness/Belcher as 1950 to 1951 (DX 13-2). However, the remaining work histories from the Jessees indicated a four month period in 1952.

<sup>9</sup>Again, while most of the work histories showed these seven months in 1953, on one occasion, Mr. Jessee listed the years of employment for Redwine Coal Co. as 1951 to 1952 (DX 13-2). On another occasion, he listed only three months with Redwine in 1953.

<sup>10</sup>On one occasion, Mr. Jessee listed 1954 to 1955 as the years he worked for Martin and Morgan (DX 13-2).

Charles, Virginia, loading coal and setting timbers through July. Finally, from August to October, Mr. Jessee loaded coal for Ezra F. Cooper at Puckett Creek (DX 2, DX 13-3, DX 14-2, and DX 14-21). SSA records confirm employment with Ezra Cooper, New Emerald Coal Co., in the third quarter (July to September) (DX 13-6 and DX 14-5). As a result, I will give Mr. Jessee credit for coal mine employment through September, 9 months. Credit: 9 months - Cumulative Total: 38 months

#### 1958

From January through March Mr. Jessee returned to Puckett's Creek to load coal for Mr. Chester Robinson. From September to December, he was a coal miner again for Mr. Adern Belcher and Mr. Jim Riden in Saint Charles, Virginia (DX 14-2, and DX 14-21). Mrs. Rosa Thompson recalls Mr. Jessee working with her husband mining coal at Puckett's Creek this year.<sup>11</sup> Credit: 7 months - Cumulative Total: 45 months

#### 1959

Mr. Jessee continued mining coal for Mr. Adern Belcher and Jim Risen through May 1959 (DX 14-2, and DX 14-21). Credit: 5 months - Cumulative Total: 50 months

#### 1967

From September to December, Mr. Jessee set jacks and timbers and mined coal for Ed Blanton (E. B.) Coal Co. in Cold Iron, Kentucky (DX 13-3, DX 14-2, and DX 14-21).<sup>12</sup> Mr. Daily Tritt verified Mr. Jessee's employment with E. B. Blanton during this period (DX 13-5).<sup>13</sup> Also, during this same time frame, Mr. Jessee apparently returned to work mining coal for Ed Brewer and Ezra Brewer (DX 14-2). However, he can't receive double credit for this period of time. The SSA summary shows slight income in the fourth quarter of the year from Virginia Darby Coal Co. (DX 13-6 and DX 14-5). Credit: 4 months - Cumulative Total: 54 months

#### 1968

From January to March, he continued his work with E. B. Coal Co in Cranks Creek, Kentucky. He also had one month of work in January with Ed Brewer. Later, from May to August,

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<sup>11</sup> At the same time, she believed they continued to work together at Puckett's Creek in 1959 and 1961.

<sup>12</sup> As a sign of his confusion towards the end of his life, Mr. Jessee in December 1993 indicated he worked for E. B. Coal in 1955 to 1956 and 1959 to 1960 (DX 13-2 and DX 12-8). Unfortunately, the employment data submitted with his earliest claims has been lost (*see* DX 11-1). However, due to specificity of the information provided, I found Mrs. Jessee's summary of her husband's employment more reliable.

<sup>13</sup> On the other hand, Mr. Tritt also "verified" Mr. Jessee's employment with Erza Cooper but in the years 1962 and 1963, rather than the claimed employment in 1957.



Mr. Jessee mined coal for Ralph Baker and Clement Kempton (DX 2, DX 13-3, DX 14-2, and DX 14-21). The SSA summary show slight income in the first quarter of the year from Virginia Darby Coal Co. and from Reeds Creek Coal for the first two quarters. (DX 13-6 and DX 14-5). Credit: 7 months - Cumulative Total: 61 months

1969

Mr. Jessee engaged in coal mining for three months with Ralph Baker in Harlin, Kentucky (DX 12-2). Credit: 3 months - Cumulative Total: 64 months

1970

From September through December, Mr. Jessee shoveled coal and set timbers for E. B. Coal Co. in Harlin, Kentucky (DX 10-1, Dx 10-3, and DX 12-2). SSA records show Mr. Jessee earned income from E. B. Coal Co. the last two quarters of the year (DX 13-6 and DX 14-5). Credit: 4 months - Cumulative Total: 68 months

1971

Between January and March, Mr. Jessee finished his career as a coal miner with E. B. Coal Co. (DX 10-1, DX 10-3, and DX 12-2). Dr. Paranthaman reported Mr. Jessee's last coal mine employment as 1971 (DX 11-6). SSA reports income in the first quarter from the mining company (DX 13-6 and DX 14-5). Credit: 3 months - Cumulative and Final Total: 71 months

### Summary

While recognizing some of the inconsistencies in the reports of Mr. Jessee's employment record, most of the information in the record is sufficient to establish he was just one month shy of a cumulative total of 6 years (or 72 months) in the coal mines. Again, although Mr. Jessee and Mrs. Jessee understandably claim that he worked 20 years as a coal miner, I find from 1952 to 1971 Mr. Jessee only spent a cumulative total of five years and eleven months actually engaged in the work of a coal miner and exposed to coal mine dust.

### Elements of Entitlement for a Survivor Claim

Having determined Mr. Jessee's length of coal mine employment, I next turn to consideration of whether Mrs. Jessee is entitled to survivor benefits under the Act and the implementing regulations, 20 C.F.R. §718.205 (a), which provide benefits to eligible survivors of a miner whose death was due to pneumoconiosis. To obtain benefits, a surviving claimant must prove by a preponderance of the evidence several facts. First, the claimant must establish eligibility as a survivor. A surviving spouse

may be considered eligible for benefits under the Act if he or she was married to, and living with, the coal miner at the time of his or her death, and has not remarried.<sup>14</sup>

Next, the claimant must prove the coal miner had pneumoconiosis.<sup>15</sup> “Pneumoconiosis” is defined as a chronic dust disease arising out of coal mine employment. The regulatory definitions include both clinical pneumoconiosis, the diseases recognized by the medical community as pneumoconiosis and legal pneumoconiosis, any chronic lung disease arising out of coal mine employment. 20 C.F.R. § 725.201 (a) (1) and (2). The regulation further indicates that a lung disease arising out of coal mine employment includes “any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. § 725.201 (b). As courts have noted, under the Act, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

Third, once a determination has been made that a miner has pneumoconiosis, it must be determined whether the coal miner's pneumoconiosis arose, at least in part, out of coal mine employment.<sup>16</sup> If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that pneumoconiosis arose out of such employment.<sup>17</sup> Otherwise, the claimant must provide competent evidence to establish the relationship between pneumoconiosis and coal mine employment.<sup>18</sup>

Finally, the surviving spouse has to demonstrate the coal miner's death was due to pneumoconiosis.<sup>19</sup> For a survivor claim filed on or after January 1, 1982, the Department of Labor regulations provide four means to establish that a coal miner's death was due to pneumoconiosis:<sup>20</sup>

- a. Death was caused by pneumoconiosis;

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<sup>14</sup>20 C.F.R. §718.4 indicates that the definitions in 20 C.F.R. §725.101 are applicable. 20 C.F.R. §725.101, in turn, refers to the term “survivor” as used in Subpart B of Part 725. 20 C.F.R. §725.214 then sets out the spousal relationship requirements and 20 C.F.R. §725.215 describes the dependency rules. According to §725.214 (a) the spousal relationship exists if the relationship is a valid marriage under state law. Under §725.215(a), a spouse is deemed dependent if she was residing with the miner at the time of his death.

<sup>15</sup>20 C.F.R. §718.205 (a) (1) and see *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993).

<sup>16</sup>20 C.F.R. §§718.203 (a) and 718.205 (a)(2).

<sup>17</sup>20 C.F.R. §718.203 (b).

<sup>18</sup>20 C.F.R. §718.203 (c).

<sup>19</sup>20 C.F.R. §718.205 (a)(3).

<sup>20</sup>20 C.F.R. §718.205 (c)(1), (2), and (3).

- b. Death was caused by complications of pneumoconiosis; or,
- c. Pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Notably, pneumoconiosis is deemed to be a substantially contributing cause of a miner's death if it hastens the miner's death.<sup>21</sup>
- d. The presumption in 20 C.F.R. § 718.304 regarding complicated pneumoconiosis applies.<sup>22</sup>

However, a survivor may not receive benefits if the coal miner's death was caused by traumatic injury, or the principal cause of death was a medical condition not related to pneumoconiosis, unless evidence establishes that pneumoconiosis was a substantially contributing cause of death.

In summary, a survivor's claim filed after January 1, 1982 must meet four primary elements for entitlement. The claimant bears the burden of establishing these elements by a preponderance of the evidence. If the claimant fails to prove any one of the requisite elements, the survivor claim for benefits must be denied. *Gee v. W. G. Moore and Sons*, 9 B.L.R. 1-4 (1986) and *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985). The four elements are: (1) the claimant is an eligible survivor of the deceased miner; (2) the coal miner suffered from pneumoconiosis; (3) the coal miner's pneumoconiosis arose out of coal mine employment; and, (4) the coal miner's death was due to coal workers' pneumoconiosis (caused; complications caused, substantially contributing cause; or complicated pneumoconiosis presumption).

### **Eligible Survivor**

According to their Virginia marriage, Mr. Frederick Jessee and Mrs. Laura Tritt Jessee were married on November 8, 1952 (DX 12-5 and DX 14-6)). With her most recent claim, Mrs. Jessee indicates in November 2001 that she was dependent on her husband and has not remarried (DX 5). Accordingly, I find Mrs. Laura Jessee is an eligible survivor under the Act and she has established the first requisite element of entitlement.

### **Issue No. 3 - Presence of Pneumoconiosis**

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<sup>21</sup>20 C.F.R. §718.205 (c) (5). Previously, the U.S. Court of Appeals for the Fourth Circuit had adopted DOL's interpretation that pneumoconiosis substantially contributes to death if it hastens death in any way. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). *See also Lukosevich v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989) (any condition, such as pneumoconiosis, that hastens a coal miner's death is a "substantially contributing cause").

<sup>22</sup>Under this section, if there is evidence of complicated pneumoconiosis, then there is an irrebuttable presumption that the miner's death was due to pneumoconiosis.

The second entitlement element that Mrs. Jessee must prove is that Mr. Jessee had pneumoconiosis. According to 20 C.F.R. §718.202, the existence of pneumoconiosis may be established by four methods: chest x-rays (§718.202 (a)(1)), autopsy or biopsy report (§718.202 (a)(2)), regulatory presumption (§718.202 (a)(3)),<sup>23</sup> and physician medical opinion (§718.202 (a)(4)).

Since the record does not contain evidence that Mr. Jessee had complicated pneumoconiosis and Mrs. Jessee filed her claim after January 1, 1982, a regulatory presumption of pneumoconiosis is not applicable. In addition, the official record contains neither an autopsy nor biopsy report. As a result, Mrs. Jessee will have to rely on chest x-rays and medical opinion to establish the presence of pneumoconiosis in her husband's lungs. Additionally, under the guidance of *Compton*,<sup>24</sup> I must consider both the chest x-ray evidence and medical opinion together to determine whether Mr. Jessee had pneumoconiosis.

#### Chest X-rays

Date of X-Ray	Exhibit	Physician	Interpretation
March 10, 1975	DX 10-4	(Unknown), B <sup>25</sup>	Negative for pneumoconiosis
February 6, 1985	DX 14-10	Saha	Moderate emphysema

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<sup>23</sup>If any of the following presumptions are applicable, then under 20 C.F.R. §718.202 (a)(3) a miner is presumed to have suffered from pneumoconiosis: 20 C.F.R. §718.304 (if complicated pneumoconiosis is present then there is an irrebuttable presumption the miner is totally disabled due to pneumoconiosis); 20 C.F.R. §718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and 20 C.F.R. §718.306 (a presumption when a survivor files a claim prior to June 30, 1982).

<sup>24</sup>*See Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4<sup>th</sup> Cir. 2000).

<sup>25</sup>B - B Reader; and BCR - Board Certified Radiologist. These designations indicate qualifications a person may possess to interpret x-ray film. A "B Reader" has demonstrated proficiency in assessing and classifying chest x-ray evidence for pneumoconiosis by successful completion of an examination. A "Board Certified Radiologist" has been certified, after four years of study and an examination, as proficient in interpreting x-ray films of all kinds including images of the lungs.

March 6, 1989	DX 11-8	Dr. Navani, BCR, B	Negative for pneumoconiosis, profusion <sup>26</sup> 0/1, <sup>27</sup> type p/s <sup>28</sup> opacities
October 11, 1990	DX 13-13	Dr. Navani, BCR, B <sup>29</sup>	Severe emphysema; no acute focal disease
October 2, 1991	DX 14-11	Dr. Saha	Moderate emphysema; old granulomatous disease
(same)	DX 14-17 & 18	Dr. Sargent, BCR, B	Negative for pneumoconiosis; emphysema
May 6, 1992	DX 13-13	Dr. Navani, BCR, B	Severe emphysema; small focal infiltrate
June 9, 1992	DX 12-11	Dr. Navani, BCR, B	Negative for pneumoconiosis, profusion 0/1, type p/s opacities; emphysema
(same)	DX 12-12	Dr. Greene, BCR, B	Emphysema
July 6, 1992	DX 13-13	Dr. Navani, BCR, B	Severe emphysema; small focal infiltrate previously observed is gone; no acute lung disease
September 9, 1992	DX 13-13	Dr. Navani, BCR, B	Severe emphysema
September 10, 1993	DX 13-13	Dr. Navani, BCR, B	Severe emphysema
February 2, 1994	DX 13-13	Dr. Navani, BCR, B	Severe emphysema
February 23, 1994	DX 13-13	Dr. Navani, BCR, B	Severe emphysema

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<sup>26</sup>The profusion (quantity) of the opacities (opaque spots) throughout the lungs is measured by four categories: 0 = small opacities are absent or so few they do not reach a category 1; 1 = small opacities definitely present but few in number; 2 = small opacities numerous but normal lung markings are still visible; and, 3 = small opacities very numerous and normal lung markings are usually partly or totally obscured. An interpretation of category 1, 2, or 3 means there are opacities in the lung which may be used as evidence of pneumoconiosis. If the interpretation is 0, then the assessment is not evidence of pneumoconiosis. A physician will usually list the interpretation with two digits. The first digit is the final assessment; the second digit represents the category that the doctor also seriously considered. For example, a reading of 1 / 2 means the doctor's final determination is category 1 opacities but he considered placing the interpretation in category 2. Or, a reading of 0/0 means the doctor found no, or few, opacities and didn't see any marks that would cause him or her to seriously consider category 1.

<sup>27</sup>According to 20 C.F.R. § 718.102 (b), a profusion category of 0/1 does not constitute evidence of pneumoconiosis.

<sup>28</sup>There are two general categories of small opacities defined by their shape: rounded and irregular. Within those categories the opacities are further defined by size. The round opacities are: type p (less than 1.5 millimeter (mm) in diameter), type q (1.5 to 3.0 mm), and type r (3.0 to 10.0 mm). The irregular opacities are: type s (less than 1.5 mm), type t (1.5 to 3.0 mm) and type u (3.0 to 10.0 mm). JOHN CRAFTON & ANDREW DOUGLAS, RESPIRATORY DISEASES 581 (3d ed. 1981).

<sup>29</sup>Although only initials appear on many of the interpretations, the same initials match the initials over Dr. Navani's interpretation of a barium swallow study of Mr. Jesse.

March 6, 1994	DX 13-13	Dr. Saha	Significant emphysema; old granulomatous disease
May 9, 1994	DX 13-13	Dr. Navani, BCR, B	Severe pulmonary emphysema
August 14, 1994	DX 4	(Unknown)	Infiltrates

None of the physicians who examined Mr. Jessee's radiographic films found sufficient evidence to render a diagnosis of pneumoconiosis. As a result, Mrs. Jessee is unable to demonstrate the presence of pneumoconiosis in her husband's lungs through chest x-rays.

#### Medical Opinion

Although Mrs. Jessee is unable to establish the presence of pneumoconiosis by chest x-rays, she still may prevail on this element of entitlement if the preponderance of the probative medical opinion supports a finding of pneumoconiosis.

Dr. Fleenor  
(DX 10-4)

According to a terse DOL summary, Dr. Fleenor conducted a pulmonary examination of Mr. Jessee on April 11, 1975. Although the pulmonary function test showed disability, that finding was not confirmed by physical examination. Dr. Fleenor diagnosed smokers' bronchitis.

Dr. S.K. Paranthaman  
(DX 11-2, DX 11-3, DX 11-6, DX 11-7, DX 12-6, DX 12-8, and DX 12-9)

On March 6, 1989, Dr. Paranthaman, board certified in internal medicine, conducted a pulmonary evaluation of Mr. Jessee. Mr. Jessee reported about 20 years of coal mine employment and the use of about five cigarettes a day since 1964. He complained about long term shortness of breath during exertion. Upon physical examination, Dr. Paranthaman heard decreased breath sounds and expiratory wheezes. The chest x-ray was negative for pneumoconiosis. However, the pulmonary function test revealed a severe airway obstruction and the blood gas studies indicated moderate hypoxemia with a significant drop in oxygenation upon exercise.

Based on his examination, Dr. Paranthaman diagnosed chronic bronchitis and emphysema. He believed Mr. Jessee's pulmonary condition was "probably related to coal dust exposure (primary) for 20 years (according to patient) and cigarette smoking (secondary) 5 cigarettes per day for 24 years (according to the patient)." The pulmonary function tests, blood gas study, and physical examination established Mr. Jessee had a severe respiratory impairment that precluded his return to coal mine employment.

Subsequently, DOL asked Dr. Paranthaman to reconsider his opinion in light of SSA documentation that showed Mr. Jessee worked less than a year as a coal miner. In that case, Dr.

Paranthaman stated it was “unlikely that his respiratory problem is related to coal dust exposure.”

Dr. Paranthaman conducted a second pulmonary examination on June 9, 1992. Mr. Jessee reported continued shortness of breath. This time, Dr. Paranthaman reported Mr. Jessee smoked a pack of cigarettes a day from 1945 to 1990. Mr. Jessee’s chest sounds were markedly decreased with expiratory wheezing. The chest x-ray was negative for pneumoconiosis; the pulmonary function test showed a very severe, non-reversible airway obstruction. The blood gas study indicated mild hypoxia. Dr. Paranthaman concluded Mr. Jessee had pulmonary emphysema due to cigarettes. Concerning the relationship between Mr. Jessee’s breathing problems and coal dust, the physician stated, “Two years of working in the mines probably has not contributed to any significant level.” Mr. Jessee was unable to work due to his severe respiratory impairment.

Dr. Taylor and Dr. Stephen Irvin  
(DX 3, DX 4, DX 11-5, DX 13-10, DX 13-13, DX 13-16, DX 14-7, DX 14-9, DX 14-13, DX 14-14, and DX 14-22)

In February 1985, Dr. Taylor saw Mr. Jessee due to breathing problems. The physician stated Mr. Jessee “has a lot of lung disease and severe emphysematous lung disease, I believe. X ray did confirm this and he also has pneumoconiosis.”

On October 23 1987, Dr. Irvin informed DOL that he had been treating Mr. Jessee for about six months. At that time, Mr. Jessee was a 55 years old retired coal miner with a several year history of dyspnea upon exertion. Dr. Irvin considered Mr. Jessee totally disabled by progressing severe COPD and chronic bronchitis. Additionally, the physician stated Mr. Jessee “is a retired coal worker and may indeed have coal workers’ pneumoconiosis.”

Over the course of several years, Dr. Irvin treated Mr. Jessee for multiple health problems. A March 1987 pulmonary function tests disclosed severe pulmonary obstruction with some possible restriction. In February 1990, Mr. Jessee reported that he had recently stopped smoking, Dr. Irvin diagnosed stable COPD with some mental changes. He prescribed the use of an inhaler. For the rest of 1990, Mr. Jessee’s condition was generally stable with some bronchitis. Between September 1991 to the end of 1992, Dr. Irvin saw Mr. Jessee every three to four months. Inhalers continued to help. During this period, while he experienced one bout of possible pneumonia, Mr. Jessee’s chest sounds were clear and he continued have a stable chronic lung disease. In 1993, Mr. Jessee visited Dr. Irvin six times for worsening dyspnea. Upon examination, the breath sounds were becoming distant, Dr. Irvin placed Mr. Jessee on steroids to assist his breathing. In the fall of that year, Mr. Jessee suffered a severe episode of shortness of breath with wheezing. In February 1994, Dr. Irvin observed some improvement in Mr. Jessee’s breathing and his chest was clear. At this time, he opined that Mr. Jessee, as a retired coal miner with severe end-stage lung disease, was entitled to black lung disability benefits. In May 1994, Mr. Jessee’s pulmonary condition worsened and required emergency treatment. Dr. Irvin heard very distant breath sounds and diagnosed severe lung disease.

On August 14, 1994, Dr. Irvin hospitalized Mr. Jessee for persistent, severe shortness of breath, both at rest and upon exercise. Mr. Jessee had become dependent on bronchodilators for breathing assistance. Dr. Irvin diagnosed end-stage COPD and pneumoconiosis exacerbated by a history of tobacco abuse. Dr. Irvin reported Mr. Jessee's occupational history as a coal miner with many years of work. Upon examination, Dr. Irvin found poor air movement in Mr. Jessee's lungs. A chest x-ray revealed infiltrates. Mr. Jessee also experienced some memory loss and confusion. Regretfully, Mr. Jessee's breathing condition worsened; he experienced respiratory failure, passed into a coma, and expired on August 19, 1994. In the final medical summary, Dr. Irvin concluded Mr. Jessee's cause of death was "end stage chronic lung disease secondary to pneumoconiosis and tobacco abuse." On the death certificate, Dr. Irvin listed coal workers' pneumoconiosis as the immediate cause of death.

In October 1995, after indicating that only a total of 3.5 years of coal mine employment had been established, DOL asked Dr. Irvin how he reached his diagnosis of pneumoconiosis. Dr. Irvin replied that he based his pneumoconiosis diagnosis on Mr. Jessee's "long" history of coal mine exposure. Noting that Mr. Jessee had smoked, Dr. Irvin also observed that Mr. Jessee had severe emphysema established by chest x-rays. Dr. Irvin understood Mr. Jessee had worked at 20 years in the mines but he also stated he was not in a position to actually document that length of employment. However, his diagnosis of pneumoconiosis was based on Mr. Jessee's account of his length of coal mining coupled with his chronic severe lung disease.

Dr. John A. Michos  
(DX 14-15)

On February 14, 1995, after considering DOL's estimate of 3.55 years of coal mine employment for Mr. Jesse, Dr. Michos, board certified in pulmonary disease and internal medicine, reviewed the medical record associated with Mr. Jessee's claims and Mrs. Jessee's survivor claims. Dr. Michos concluded Mr. Jessee's death was secondary to severe COPD due to a 45 pack year<sup>30</sup> history of cigarette abuse which ended in 1990. Dr. Michos opined, "Mr. Jessee does not have evidence of CWP (coal workers' pneumoconiosis) based on a 3.55 history of CME (coal mine employment) which ended in 1971." As a result, pneumoconiosis did not appear to have caused or hasten his death.

#### Discussion

In light of the conflicting medical opinions, I must first assess the relative probative value of each medical evaluation and then determine whether Mrs. Jessee is able carry her burden of proving the presence of pneumoconiosis in Mr. Jessee's chest through the preponderance of the more probative medical opinion. The two factors I consider in evaluating relative probative weight are: a) documentation and b) reasoning.

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<sup>30</sup>A pack year represents the consumption of a pack of cigarettes a day for one year.



As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation, such as chest x-rays, pulmonary function tests, arterial blood gas studies, and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two or one encounter.

The second factor of reasoning involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

Applying the two probative determination factors, I find Dr. Fleenor's 1975 examination which was based on dated documentation, has little probative value on the state of Mr. Jessee's pulmonary condition nearly twenty years later.

In 1985, Dr. Taylor, who was treating Mr. Jessee, diagnosed severe emphysema. However, after referencing a chest x-ray that established the presence of emphysema, Dr. Taylor did not indicate any other objective medical evidence he used to reach his black lung diagnosis. Consequently, not only is his opinion somewhat dated, and thus less well documented, I am unable to really ascertain the documentation supporting his opinion. Additionally, and significantly, Dr. Taylor presented his pneumoconiosis statement without any explanation. In the absence of any stated rationale, I also consider his assessment not well reasoned and accordingly of little probative value.

After two pulmonary examinations, Dr. Paranthaman had a good medical foundation for his diagnosis of chronic bronchitis and emphysema. However, his documentation is somewhat dated in comparison to the assessments of Dr. Michos and Dr. Irvin, and obviously did not contain information about the circumstances of Mr. Jessee's death two years after his last exam. Further, Dr. Paranthaman based his opinion that Mr. Jessee did not have pneumoconiosis on an incorrect length of coal mine employment of two years. Due to this incorrect documentation concerning Mr. Jessee's work as a coal miner, Dr. Paranthaman's opinion has diminished probative value.

The remaining two medical opinions of Dr. Michos and Dr. Irvin have positive, but different, factors enhancing the probative value of their assessments. At the same time, they both share common documentation and reasoning deficits which adversely, and ultimately, negate, in varying degrees, the probative value of their respective opinions.

On the positive probative side, Dr. Michos, as a board certified pulmonary disease expert, is the best qualified physician in this case to have reviewed Mr. Jessee's entire medical record and assess his pulmonary problem. His expertise is particularly relevant in determining whether Mr. Jessee has pneumoconiosis. Dr. Michos noted the negative chest x-rays, considered the various pulmonary and

respiratory tests, and factored in Mr. Jessee's length of coal mine employment. Through that review process, Dr. Michos concluded Mr. Jessee did not have pneumoconiosis because DOL's reported 3.55 years of coal mine employment was insufficient to attribute coal dust exposure as a cause of Mr. Jessee's severe COPD. Instead, Dr. Michos identified 45 years of smoking a pack of cigarettes a day as the cause of Mr. Jessee's respiratory impairment. Certainly, Dr. Michos' assessment appears to be most consistent with all the medical evidence in the record.

As both the treating physician and attending doctor at the time of Mr. Jessee's death, Dr. Irvin was well positioned to present the most probative medical opinion in the record. In medical evidence terms, Dr. Irvin had a firm documentation foundation consisting of numerous consultations, examinations, and tests during the nearly ten year course of his treatment of Mr. Jessee's obstructive pulmonary disease. Further, he attended Mr. Jessee in the last days of his life and was exceptionally familiar with Mr. Jessee's breathing problem. Based on Mr. Jessee's representation of the length of his coal mine employment, Dr. Irvin opined both in terms of the death certification and in response to DOL that coal dust exposure during Mr. Jessee's long history of coal mining sufficiently contributed to his respiratory disease to warrant a diagnosis of coal workers' pneumoconiosis.

Absent any other consideration, in the medical opinion standoff between Dr. Michos and Dr. Irvin, Dr. Irvin's diagnosis of pneumoconiosis might indeed prevail. However, both Dr. Michos' and Dr. Irvin's opinions suffer significant probative deterioration due to other reasoning and documentation shortfalls.

In terms of reasoning, both physicians were presented with two respiratory health risks in Mr. Jessee's case - coal dust and cigarette smoke. Yet, neither doctor adequately explained how they were able to factor in, or out, Mr. Jessee's coal dust exposure as a cause of his pulmonary illness. Other than observing 3.55 years of coal mine employment did not provide a basis for a pneumoconiosis diagnosis, Dr. Michos provide no explanation for his conclusion that coal dust was not a factor. He failed to indicate whether, and which, if any, medical tests helped him determine that cigarette smoke was the sole factor in Mr. Jessee's pulmonary failure.

In a very similar manner, while being aware of both cigarette smoke and coal dust as health hazards for Mr. Jessee, Dr. Irvin did not identify in his opinion the medical tests that helped him conclude coal dust was a contributing cause of Mr. Jessee's severe emphysema. Instead, again like Dr. Michos, but with a different conclusion, without any other stated justification, Dr. Irvin concluded Mr. Jessee had pneumoconiosis due to the length of his coal mine employment.

The physicians' reliance on length of coal mine employment as the foundation for their opinions concerning the presence of pneumoconiosis leads to the most significant deficiency in their respective opinions. The opinions of both Dr. Michos and Dr. Irvin about pneumoconiosis are both probatively flawed because: a) length of coal mine employment was the key discriminating factor in their diagnoses; and, b) each doctor relied on an inaccurate length of coal mine employment.

As discussed earlier, I have concluded Mr. Jessee spent a total of 5 years and 11 months exposed to coal dust. Dr. Michos believed Mr. Jessee's exposure was somewhat shorter at 3.55 years.

Dr. Irvin chose to rely on nearly 20 years of coal mine employment reported to him by Mr. Jessee.

Consequently, Dr. Michos' opinion rests on an understatement of Mr. Jessee's coal mine employment. Whereas, Dr. Irvin's conclusion that coal dust contributed to Mr. Jessee's emphysema is predicated on a significantly overstated length of coal mine employment. As a result, the opinions of both physicians suffer substantial probative loss.<sup>31</sup>

In summary, for the reasons noted above, in particular the reasoning and documentation deficiencies associated with Dr. Irvin's coal workers' pneumoconiosis diagnosis, I find the medical opinion in this record probatively insufficient to support a finding of pneumoconiosis. As a result, Mrs. Jessee is not able to prove through the preponderance of probative medical opinion that her husband had pneumoconiosis.

Further, in recognition of the mandate of the *Compton* decision to consider all the medical evidence together, I still conclude the entire record as a whole fails to prove Mr. Jessee had pneumoconiosis. All of the radiographic evidence was negative for pneumoconiosis. Although the other objective medical evidence identified both a restrictive and severe obstructive pulmonary condition, the record does not contain a reasoned and accurately documented medical opinion indicating that Mr. Jessee's nearly six year exposure to coal dust, in conjunction with 45 pack years of cigarette smoking, partially caused his severe emphysema. Thus, when all the chest x-rays and medical opinions are considered together, the record still fails to show Mr. Jessee had black lung disease.

In her applications for survivor benefits and her letter to OALJ, Mrs. Jessee expresses her sincere and understandable conviction that Mr. Jessee had black lung disease. She highlights in particular the death certificate which lists coal workers' pneumoconiosis as the cause of death, references medical reports stating her husband had pneumoconiosis, and recalls his chronic struggle for breath and continuous need for oxygen therapy. While my analysis will probably never alter her perception, I emphasize that Dr. Irvin's pneumoconiosis entry on Mr. Jessee's death certificate and his references to pneumoconiosis in medical reports are unreliable because Dr. Irvin believed Mr. Jessee was a coal miner for 20 years and was exposed to coal dust during the entire period. Yet, since his actual work as a miner totaled just under six years, Mr. Jessee did not experience the extensive exposure to coal mine dust used by Dr. Irvin to reach his coal workers' pneumoconiosis diagnosis. Dr. Irvin's reliance on an incorrect length of coal mine employment is particularly significant considering Mr. Jessee had a very substantial history of 45 pack years of cigarette use and his principal pulmonary affliction as established by chest x-rays and medical examinations was severe emphysema.

## Conclusion

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<sup>31</sup>Dr. Irvin's pneumoconiosis diagnosis is further compromised by his insistence on using Mr. Jessee's claim of coal mine employment even when asked by DOL to reconsider in light of DOL's estimate 3.55 years which is closer to my finding of 5 years, 11 months, than Dr. Irvin's use of 20 years.

Neither the preponderance of the chest x-ray evidence nor probative medical opinion establishes that Mr. Jessee had pneumoconiosis. Having failed to establish that requisite element of entitlement, Mrs. Jessee's survivor claim must be denied.

### **ORDER**

Accordingly, the claim of MRS. LAURA M. JESSEE for survivor benefits under the Act is **DENIED**.

**SO ORDERED:**

**A**  
RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: December 2, 2002  
Washington, DC

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN.: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. § 725.478 and § 725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, DC 20210.